SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 10 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-888

GEORGE K. WYMAN, Commissioner of Social Services of the State of New York, individually and in his official capacity,

Petitioner,

against

MARIA ALMENARES, CRESENCIA GARCIA, and JANET RODRIGUEZ, individually, on behalf of their minor children, and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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GEORGE K. WYMAN, Commissioner of Social Services of the State of New York, individually and in his official capacity,

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MARIA ALMENARES, CRESENCIA GARCIA, and JANET RODRIGUEZ, individually, on behalf of their minor children, and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Commissioner of Social Services of the State of New York, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *Maria Almenares, Cresencia Garcia and Janet Rodriguez, et al.* v. *George K. Wyman, and Jule Sugarman, et al.* (judgment entered December 10, 1971). On petitioners' motion, the mandate was stayed by the Court of Appeals on December 22, 1971. F.R.A.P. § 41(b).

Citations to Opinions Below

Neither the District Court nor the Court of Appeals opinion has, as yet, been reported. The District Court opinion is reproduced as Appendix "A" to this petition. The Court of Appeals opinion is reproduced as Appendix "B" to this petition.

Jurisdiction

The judgment of the United States Court of Appeals in this case was entered on December 10, 1971.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Does the ruling of the Court of Appeals that there can be pendent jurisdiction of a party over whom there is no independent basis for federal jurisdiction constitute an improper extension of this Court's pendent jurisdiction doctrine?

2. Is the statutory claim aaginst petitioner maintainable in the federal courts?

3. Is HEW regulation 45 CFR § 205.10 in conflict with the Social Security Act and does it constitute an improper application of HEW's rule making power?

Statement of the Case

The instant case raises substantial questions as to the concept of pendent jurisdiction over third parties in the context of federal question jurisdiction and whether a recently enacted HEW regulation constitutes an improper extension of the Social Security Act and this Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

Following this Court's decision in *Goldberg*, New York modified its regulations (18 NYCRR § 351.26) concerning the termination and reduction of public assistance benefits to provide that prior to a reduction or termination of benefits, the local social service agency must conduct a pre-termination hearing which may be informal, but must afford timely and adequate notice, an opportunity to be heard and to confront adverse witnesses, the right to be represented by counsel, and a decision based on the rules of evidence which explains the reasons for the decision. Review of adverse action is provided in a state post-reduction "hearing" which affords additional due process procedural safeguards. New York Social Services Law § 353; 18 NYCRR §§ 84.2-84.23.

On February 13, 1971, HEW published a new regulation effective April 14, 1971. 45 C.F.R. § 205.10, 36 Fed. Reg. 3034 (1971), among other things, provides that each state plan under the categorical assistance programs must provide for continuation of public assistance until a decision is rendered following a state "fair hearing" (a copy of this regulation is found in Appendix C).

Petitioner has refused to implement this regulation on the grounds that it is inconsistent with the requirements of the Social Security Act and at variance with *Goldberg*. It appears that approximately ten other states, including California and New Jersey, have refused to implement § 205.10.

The present action was commenced by order to show cause on or about August 5, 1971 by three recipients of public assistance who claimed that they had been denied or had received inadequate hearings by the local agency, the New York City Department of Social Services, before their public assistance has been reduced.

Independently of this action and following protests to HEW and discussions on September 3, 1971, New York commenced an action against the Secretary of HEW in the Northern District of New York seeking to declare 45 C.F.R.

205.10 to be invalid on the grounds that it was unauthorized and arbitrary and capricious. *New York* v. *Richardson*, 71 Civ. 406 (N.D.N.Y., 1971). The District Court was notified of the commencement of this action challenging the HEW regulations on September 16, 1971.

On November 3, 1971, the District Court (PIERCE, J.), acting summarily, issued an injunction restraining defendants from terminating, suspending, or reducing payments under the AFDC or AABD programs until an opportunity is afforded for a fair hearing comporting with the requirements of 45 C.F.R. § 205.10.

In its opinion, the District Court found that the complaint stated a colorable constitutional claim through allegations that plaintiffs had been denied pre-termination hearings or afforded inadequate pre-termination hearings by the New York City Department of Social Services. The District Court then held that it had pendent jurisdiction over the claim by the welfare plaintiffs of violation of the HEW regulation and that the "statutory" claim might properly be prosecuted as a class action (F.R.C.P. 23[b][2]) for injunctive and declaratory relief against the City and State defendants, but not against other local social service administrators.* The District Court also denied petitioner's claim that 45 C.F.R. 210.05 was in conflict with the Social Security Act's provisions for local administration, 42 U.S.C. § 602(a)(3), and that the regulation goes beyond HEW's rule making powers.

On November 8, 1971, the Court of Appeals granted a stay of the injunction pending an expedited hearing of the appeal on November 12, 1971. The stay was then continued pending a decision of the appeal.

On December 10, 1971, the Court of Appeals affirmed the order of the District Court, but stayed the injunction for 60 days to permit compliance. The Court of Appeals

* The District Court also allowed eight other public assistance recipients to intervene in the action.

issued an interim injunction (43a)** which provided for the continuation of pre-termination hearings by the local social service agencies under specified conditions.

In its decision, the Court of Appeals found that there was pendent jurisdiction over petitioner but on a different basis than reached by the District Court. It held that the doctrine of pendent jurisdiction is sufficiently broad to support a claim against a person not a party to the primary, jurisdictional granting claim. The opinion also held that the granting of a class action as to the statutory claim was proper and within the discretion of the District Court. The Court of Appeals also agreed with the District Judge that the federal regulation in question was in conformity with the Social Security Act and did not constitute an invalid exercise of HEW's rule making power.

The Court of Appeals did, however, find that time was required to implement the federal hearing procedures and gave the State at least 60 days to comply. The State sought an extension of the stay pending application to this Court for a writ of certiorari. On December 22, 1971, an extension of the stay was granted pursuant to F.R.A.P. § 41(b), with a further extension of 30 days, should this Court deny the petition for certiorari. The stay was granted on the condition that the petition for certiorari be filed by January 10, 1972.

Reasons for Granting Certiorari

1. The ruling of the Court of Appeals that there can be pendent jurisdiction of a party over whom there is no independent basis for federal jurisdiction constitutes an improper extension of this Court's pendent jurisdiction doctrine.

The instant case presents complex jurisdictional problems concerning pendent jurisdiction. The Court of Ap-

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** Numbers in parentheses refer to pages in the appendix.

peals in granting pendent jurisdiction over a defendant who would not otherwise be amenable to federal jurisdiction has extended the doctrine of pendent jurisdiction far beyond *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966) and *Rosado* v. *Wyman*, 397 U.S. 397, 405 (1970).

The Court of Appeals relying on two of its recent decisions, *Astor-Honor, Inc.* v. *Grosset & Dunlap, Inc.*, 441 F. 2d 627 (2d Cir. 1971) and *Leather's Best, Inc.* v. *S.S. Mormaclynx*, —— F. 2d —— (2d Cir. 1971), slip opinions at 247, 258-59, held that the doctrine of pendent jurisdiction is sufficiently broad to support a claim against a person not a party to the primary, jurisdiction-granting claim.

Petitioner believes that the Second Circuit's concept of pendent jurisdiction represents an overly broad reading of this Court's decisions on pendent jurisdiction and in conflict with other federal appellate and district courts in this matter. This conflict arises out of an attempt to extend this Court's holdings in *United Mine Workers* v. *Gibbs, supra*, at 725 (1966) and *Rosado* v. *Wyman, supra* (where both the principal and pendent claims involved the same parties), to situations presenting pendent claims of plaintiffs who could not have invoked the jurisdiction of a federal court and pendent claims of defendants who would not otherwise be amenable to federal jurisdiction.

In *Hymer* v. *Chai*, 407 F. 2d 136, 137-138 (9th Cir. 1969), the Ninth Circuit held that "joinder of claims, not joinder of parties, is the object of the doctrine of pendent jurisdiction." The Court in *Hymer* went on to note that pendent jurisdiction was not designed to permit a party without a federally cognizable claim to invoke federal jurisdiction by joining a different party plaintiff asserting an independent federal claim growing out of the same operative facts. *Id.* at 138. See also *Campbell* v. *City of Atlanta*, 277 F. Supp. 395 (N.D. Ga. 1967) but *cf. Wilson*

v. *American Chain & Cable Co.*, 364 F. 2d 558 (3rd Cir. 1966); *Hatridge* v. *Aetna Casualty & Surety Co.*, 415 F. 2d 809 (8th Cir. 1969).

A number of federal courts have denied pendent jurisdiction as to defendants who were not otherwise amenable to federal jurisdiction. *Williams* v. *United States*, 405 F. 2d 951 (9th Cir. 1969); *Gautreau* v. *Central Gulf Steamship Corp.*, 255 F. Supp. 615 (E.D. La. 1966); *Letmate* v. *B & O Railroad*, 311 F. Supp. 1059 (D. Md. 1970); *Rundle* v. *Madigan*, 331 F. Supp. 492 (N.D. Cal. 1971); *Barrows* v. *Faulkner*, 327 F. Supp. 1191 (N.D. Okla. 1971).

The problems which may result from the introduction of pendent parties are substantial. The possibilities for using pendent jurisdiction as a means for avoiding jurisdictional requirements, are very great. Indeed, the Court of Appeals recognized the danger that might result when it warned that a court must be alert to possibilities of abuse in this area (43a).

In the instant case, it is obvious that it is the statutory and not the constitutional claim which is the center of the controversy. No attempt was made by respondents or the District Court to prove a class action as to the constitutional claim while a class action was granted as to the pendent statutory claim. Likewise, although the statutory claim is basically against State policy and the State is really the principal defendant,* this action brought under Civil Rights jurisdiction alleges no independent constitutional claim against the State.

Clearly, the danger of abuse in obtaining pendent jurisdiction over parties who would not otherwise be within the jurisdiction of the federal courts is so great that this Court should grant certiorari to review the Court of Appeals' pendent jurisdiction doctrine.

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* The City has throughout these proceedings taken no position on the statutory claim.

The vice in the postion taken below is compounded by the fact that there was pending in the Northern District of New York an action by New York against HEW challenging the regulation, while in the instant case HEW was not a party.

2. The statutory claim against petitioner was not maintainable in the federal courts.

Certiorari should also be granted on the question of whether the federal courts are the appropriate forum for resolving regulatory conflicts involving HEW Regulations. Given recent rulings by HEW which permit participation in conformity hearings, it was improper for the District Court to proceed prior to the commencement of conformity hearings.

Until HEW determines the existing State policy to be invalid petitioner must be allowed to follow his own regulations which are part of a valid state plan of public assistance. At the conclusion of a HEW hearing, petitioner has the right to petition for a review in a United States Court of Appeals, 42 U.S.C.A. § 1316(a)(3), to challenge the determination. A conformity hearing is the proper federal legislative forum to air the issue of whether New York's practice conforms to the Social Security Act and review under § 1316(a)(3), the proper review of such action. 42 U.S.C. § 1316 is the only specific statutory provision for judicial review. Subsection (a)(1) thereof specifically contemplates a decision on conformity by HEW in the first instance. This is an administrative remedy which should be followed. *Rosado* v. *Wyman, supra* at page 420 is not to the contrary. *Rosado* is distinguishable on the grounds that it involved the interpretation of the Social Security Act itself, not an HEW regulation. Likewise, at the time of the *Rosado* decision, welfare recipients could not participate in review hearings before HEW. Therefore, this Court held there was jurisdicition in the federal courts to consider the issue because of the lack to plaintiffs of an effective federal

administrative remedy. The above remedy is now available.* *National Welfare Rights Organization* v. *Finch*, 429 F. 2d 725 (1970).

In addition, a forum in which respondents could participate was already available for the resolution of this controversy. On September 3, 1971, the State commenced an action for a declaratory judgment against HEW in the Northern District of New York pursuant to 28 U.S.C. § 2201 and § 2202 with jurisdiction founded upon 28 U.S.C. § 1346(a)(2) and § 1361. *State of New York* v. *Richardson*, 71 Civ. 406 (N.D.N.Y. 1971). The State seeks to enjoin the operation of 45 CFR 205.10 as being arbitrary and capricious and, thus, raises the identical statutory claim at issue in the present case.

The proceedings in the Northern District would provide a proper forum for resolving the regulatory controversy. Respondents could intervene in the Northern District proceedings and a determination of this controversy could be had on a state wide basis while, at the same time, avoiding the complex jurisdictional problems which have already been noted.

In addition, the State action against HEW would have the advantage of having HEW as a party to present its views on the regulatory conflict and the question of conformity of the State plan with HEW regulations. Certainly, the lack of HEW's presence in the instant case is a sufficient basis for finding that the issuance of the injunction constituted an abuse of the federal court's equitable powers. The absence of HEW made it impossible for the State to properly challenge the validity of the HEW's regulation. While the issues involved in the present case are primarily legal in nature, any opportunity to contest HEW's purpose in enacting 45 CFR 205.10 was lost when the District Court failed to defer to the Northern District action.

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* At a minimum, respondents should have requested HEW to hold a conformity hearing.

3. HEW Regulation 45 CFR § 205.10 is in conflict with the Social Security Act and constitutes an improper application of HEW's rule making power.

The question of whether 45 CFR § 205.10 is in conflict with the Social Security Act is a substantial issue which requires review by this Court. Approximately ten states including New York have refused to implement this regulation which provides, among other things, that no termination or reduction of public assistance take place before a determination is reached following a state fair hearing. It is petitioner's position that 45 CFR § 205.10 is invalid in that it conflicts with the Social Security Act and is an improper attempt to legislate an extension of this Court's ruling in *Goldberg* v. *Kelly, supra*. *Goldberg* held that a "pre-termination review hearing" had to be held and a decision reached before a recipient could be terminationed from public assistance. The State and City have fulfilled this requirement by promulgating 18 NYCRR § 351.26* (see appendix D).

New York has a State supervised locally administered system of public assistance under the Social Security Act. Titles I, IV, XIV, and XIX of that Act offer states the option of administering the programs covered by each of those titles or assigning the administrative responsibility to local agencies. New York has chosen the latter course. Vital to this system is the right of the local agency to decide who is accepted for welfare and who will be removed. These are administrative matters to be determined by the local welfare district. New York Social Services Law § 344. To require the continuation of public assistance through the State fair hearing rather than the constitutionally mandated review hearing before the local agency would be to make the State the sole administrator of public assistance in New York. This clearly is in conflict with

* It should be noted that assistance need not be continued pending a hearing under either state or federal regulations where the only question involved is one of state policy.

the Social Security Act which permits local administration. 42 U.S.C.A. § 602(a)(3). It makes the local hearing, now a State requirement, a vain and hollow procedural exercise.

The only requirement of the Social Security Act, 42 U.S.C.A. § 602(a)(4) is that the State plan "provide for granting an opportunity for a fair hearing before the State agency . . ." Therefore, the Social Security Act and prior HEW regulations in pursuance thereof only require that the State provide a fair hearing to review the actions of the local agencies. It seems entirely reasonable to say that the purpose of the Social Security Act is to provide public assistance only to those persons who are eligible under the various categories set up by the Social Security Act or Social Services Law, § 344. Thus, prior to *Goldberg,* as soon as the local agency notified the recipient, aid was cut off. Ineligible persons were to be removed from the rolls since this comported with the carried out statutory purpose, which was to only aid "needy families with children." 42 U.S.C.A. § 602(a).*

Whatsoever force and effect the regulations have must be derived entirely from the statute under which it was enacted. *Metlakatla Indian Community* v. *Egan,* 369 U.S. 45 (1962); *Organized Village of Kake* v. *Egan,* 369 U.S. 60 (1962). Where the regulation conflicts with the statute, it is without force and effect.

Whatever right the Secretary of HEW has to make rules or regulations, 42 U.S.C.A. § 1302, he may not use them to veto State legislation and regulations which comply with congressional requirements. The language of § 1302 restricts his rule making power to that necessary to the functions Congress has given him. This does not give him the function of expanding the Due Process Clause as part of

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* The present regulation appears to represent a substantial change in HEW policy. In its *amicus* brief in *Goldberg* HEW took the position that no hearing was required before assistance was terminated (*amicus* brief p. 15).

that grant. It is the Congressional statute which is the measure of compliance. *Rothstein* v. *Wyman*, 398 U.S. 275 (1970); *Rosado* v. *Wyman, supra*, 402-407 (1970); *King* v. *Smith*, 392 U.S. 309, 317, 323-325, 330, 331-332. See also *Kandelin* v. *Social Security Board*, 136 F. 2d 327 (2d Cir. 1943); *Ford* v. *Ribicoff*, 199 F. Supp. 822, 828 (E.D. Tenn. 1961).

The regulations of HEW are entitled only to weight as an interpretation of Congressional provisions. *Lewis* v. *Martin*, 397 U.S. 552, 556-558 (1970); *Rosado* v. *Wyman, supra; Solman* v. *Shapiro*, 300 F. Supp. 409, 416 (D. Conn. 1969), *aff'd.* 396 U.S. 5 (1969). Even as an interpretation of the statute, the regulations are not binding. *Rosado* v. *Wyman, supra* at page 415; *Kandelin* v. *Social Security Board, supra.*

This Court in *Goldberg* v. *Kelly*, at 397 U.S. 260, footnote 3, noted that it was *not* interpreting the Social Security Act. If HEW believes that by promulgating a new regulation, it can broaden the area of Due Process, then, in this respect, it is acting as a departmental Super-Supreme Court, extending the holding of *Goldberg* to new areas untouched by the decision. This only can be done by the Supreme Court or Congress.*

By purporting to eliminate the two-hearing requirements, continuing undiminished assistance on any proposed action to terminate, suspend or reduce assistance, and specifically allowing claimant the right to request a delay in the State fair hearing, HEW has created a procedure designed to oppress petitioner in the efficient and economical administration of the welfare program. Dilatory tactics on the part of ineligible recipients will be rewarded. Scarce pub-

* In footnote 3 to the *Goldberg* decision, page 257, this Court's opinion notes that its decision also applies to New York's Home Relief program which, of course, the new HEW regulation does not since Home Relief is not federally funded.

lic funds are expended on demand.* The question of what is the proper level of payments is the ultimate relief requested. The purpose of going to fair hearing expeditiously is eliminated. There is no question that most recipients are properly terminated. In cases of error, retroactive payments are made by defendants. 18 NYCRR § 351.27. As asserted by Justice Black in his vigorous dissent in *Goldberg* v. *Kelly, supra*, pages 277-278:

> "But I know of no situation in our legal system in which the person alleged to owe money to another is required by law to continue making payments to a judgment-proof claimant without the benefit of any security or bond to insure that these payments can be recovered if he wins his legal argument. Yet today's decision in no way obligates the welfare recipient to pay back any benefits wrongfully received during the pretermination evidentiary hearings or post any bond, and in all 'fairness' it could not do so. These recipients are by definition too poor to post a bond or to repay the benefits that, as the majority assumes, must be spent as received to insure survival."

This Court in *Goldberg* held that Due Process demanded more for the poor but a further extension solely by HEW fiat cannot rationally by sustained. Public assistance may be "property" or a right, *Goldberg* v. *Kelly*, at page 262, footnote 8 but it is not an unlimited one. There are standards. The regulation effectively destroys them.

As the recent events in State Legislatures throughout the country have dramatically demonstrated, we have reached the point where no additional funds will be appropriated for public assistance. Any "regulation" which has the net result of providing assistance to unqualified and

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* In its *amicus* brief in *Goldberg* HEW noted: "It seems predictable that if payments are continued pending 'fair hearing' there will be more requests for such hearings, and more payments will be made to ineligible individuals" (*amicus* brief pp. 26-27).

undeserving claimants can only have the swift and ultimate effect of reducing the payments to the deserving poor. Petitioner has kept this in mind. It is a proper function for the State to determine who are the most deserving among applicants under the statutory requirements. Neither the Constitution nor Congress has empowered HEW to allow payments to unqualified applicants. State officials are required to allocate limited public welfare funds among the myriad of potential recipients. *Dandridge* v. *Williams*, 397 U.S. 471 (1970). The courts should not second-guess them.

In conclusion, certiorari should be granted to review a regulation which has (1) the effect of imposing a state-administered public assistance program contrary to the dictates of the statute and (2) the purpose to expand a decision of this Court based, not on an interpretation of Social Security Act, but rather, on the Due Process Clause, is improper, illegal and void.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York, January 10, 1972.

Respectfully submitted,

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Appendix A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 CIV. 3503

MARIA ALMENARES, CRESENCIA GARCIA, and JANET RODRIGUEZ individually, on behalf of their minor children, and on behalf of all others similarly situated,

Plaintiffs,

v.

GEORGE K. WYMAN, Commissioner of Social Services for the State of New York, individually and in his official capacity, and JULE SUGARMAN, Commissioner of Social Services for the City of New York, individually, and in his official capacity,

Defendants.

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OPINION

Plaintiffs in this action have moved this Court for a preliminary injunction and for an order determining that this action may properly be maintained as a class action pursuant to Rule 23, Fed. R. Civ. P. This suit is brought by recipients of public assistance benefits in the federally-aided program of Aid to Families with Dependent Children (AFDC).[1] The defendants are George K. Wyman, the Commissioner of Social Services of the State of New York, and Jule Sugarman, the Commissioner of Social Services of the City of New York. The plaintiffs assert two claims, one constitutional and the other statutory.

[1] Social Security Act of 1935, 42 U.S.C. §§ 601-610 (1970). As in each of the categorical assistance programs, grants-in-aid are provided by the Federal government to States which choose to administer programs of assistance created by the Federal statute.

Appendix A

The constitutional claim is that defendants have reduced plaintiffs' public assistance benefits without a hearing, or without a hearing sufficient to meet the requirements of the Due Process Clause. The statutory claim is that defendants have failed to implement the federal regulation governing fair hearings upon termination, suspension or reduction of assistance, 45 C.F.R. § 205.10, 36 Fed. Reg. 3034 (1971). Ultimately, plaintiffs seek a declaratory judgment, a permanent injunction, restitution of moneys wrongfully withheld, as well as compensatory and punitive damages to the named plaintiffs and the members of their class. At this stage, the only questions before the Court are whether to issue an order determining that this is a proper class action and whether to issue a preliminary injunction.

The three named plaintiffs in the case are Maria Almenares, Cresencia Garcia, and Janet Rodriguez. Plaintiff Almenares had been receiving an AFDC grant of $120.50 bi-monthly. In a letter dated July 12, 1971, she was informed that her bi-monthly grant would be reduced to $6.35 effective July 16, 1971. The reasons given were that her landlord had stated that she had not paid rent for part of May, or for June and July. On this ground her rent allowance was subtracted. In addition, her grant was further reduced because she was allegedly receiving $25 a week as support money from her husband. As to the rent, Mrs. Almenares contends that she continued to have an obligation to pay rent, but that she was withholding rent money pursuant to Section 755, N.Y. Real Property Actions & Proc. (McKinney 1963). She also asserts that, but for two $25.00 weekly payments, she had not been receiving support money from her husband. Prior to the actual reduction, Mrs. Almenares was not granted a hearing in which to raise her contentions.

Plaintiff Garcia received notice, dated April 14, 1971, stating that her grant would be reduced as of May 16, 1971, from $117 bi-monthly to $93.60 bi-monthly. The rea-

son for the reduction was that Mrs. Garcia had allegedly endorsed checks which she had claimed were not received. The reduction actually took effect beginning May 1, 1971 and a review was not held until July 9, 1971. The decision upon review was adverse to Mrs. Garcia, but she claims that the nature of the review itself did not afford her due process.

The last named plaintiff, Janet Rodriguez, received notice in the beginning of July advising her that her assistance would be suspended because she had been "working for some time." A later notice stated that her grant would be reduced to $27.45 bi-monthly. Although plaintiff attests that she had not been working and she requested a review to contest the grounds for the reduction, no review was afforded as of the date of the filing of this suit. The reduction took effect, however, as of her check for the first half of August.

The New York City Department of Social Services relies, in each of these cases, on its alleged compliance with 18 N.Y.C.R.R. § 351.26 (1971),[2] the fair hearing rule promul-

[2] The rule reads, in part, as follows:

351.26 Proposed discontinuance, suspension or reduction of grant; prior notice to recipient; additional local review and subsequent determination. (a) When a social services official proposes to discontinue, suspend or reduce a grant of public assistance he shall notify the recipient in writing of his intention to discontinue, suspend or reduce the grant at least seven days prior to the proposed effective date of the discontinuance, suspension or reduction together with the reasons for his intended action, unless such discontinuance, suspension or reduction is in response to the request of the recipient or is due to: the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the State and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category. Such

(*footnote continued on following page*)

gated by the State, as well as Procedure No. 71-21, the City's fair hearing rule. Procedure No. 71-21 delineates eight situations in which assistance may be curtailed with-

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(*footnote continued from previous page*)

notification shall further advise the recipient; that if he makes a request therefor, he may appear at the time and place indicated in the notice before the person identified therein who will review his case with him; that at such review he will be afforded an opportunity to question any persons who appear at the review and present evidence against him, that he will be afforded an opportunity to present written and oral relevant evidence and argument to demonstrate why his grant should not be discontinued, suspended or reduced; and that he may appear and present such evidence and argument, and ask questions by himself or by an attorney or other representative. Only the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance, suspension or reduction, and who had not participated in making the proposed determination under review shall be designated to make such review. When a recipient requests such review, the designated reviewer shall, at the time and place indicated in the notice to the recipient, review with the recipient and his representative, if any, the evidence and reasons supporting the proposed action shall afford the recipient an opportunity to question any persons who appear and present evidence against him; and shall afford the recipient an opportunity to present relevant evidence and argument why the proposed discontinuance, suspension or reduction should not be made. Upon the basis of the evidence and argument submitted at the review, the reviewer shall promptly make an appropriate written recommendation to the social services official, together with his reasons therefor, including reference to applicable provisions of law, board rule, department regulation, and approved local policy. The social services official shall expeditiously determine, upon the basis of the recommendation and the evidence and arguments submitted at the review, whether the proposed discontinuance, suspension or reduction shall or shall not be made effective as proposed and shall send an appropriate written notice of his decision to the recipient and his representative, if any, including the reasons for his determination and the evidence he relied on. Assistance shall not be discontinued, suspended or reduced prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance, suspension or reduction, whichever occurs later.

out a prior hearing.[3] As to each of the named plaintiffs, the City defendant relies on subsection (g)[4]: "Discontinuance of assistance or reduction of client's budget is mandated by law." For example, as to plaintiff Rodriguez the City states that since a Department regulation requires that income from a job must be deducted from welfare assistance, Mrs. Rodriguez' grant was properly reduced without a prior hearing. The City states that

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[3] Procedure No. 71-21(B)(2) states that:

> Notification must be sent to the client of the intent to reduce, suspend or discontinue assistance at least seven (7) calendar days prior to the planned effective date of such action indicating specific reasons for the proposed action except in the situations listed below. Those specific situations which do not require notification are as follows:
>
> a. Client has requested reduction, suspension or discontinuance of assistance.
> b. Death of unattached person.
> c. Admission to institution (mental, penal, correctional, etc.).
> d. Client's whereabouts unknown and there is no forwarding address.
> e. Client has left the State permanently.
> f. Reduction of client's budget is on the basis of information supplied by the client.
> g. Discontinuance of assistance or reduction of client's budget is mandated by law.
> h. Reclassification as to category.
>
> Although the rule states only that notification need not be sent in the enumerated instances, the City states in its affidavit that these are also situations in which it is not necessary to grant a hearing before assistance is curtailed. Of course, this is the clear implication of the rule since a pretermination hearing could not be held if prior notice is not given.

[4] With regard to Mrs. Almenares' rent, the City relies upon subsection (f), stating that Mrs. Almenares advised the Department of Social Services that she was not paying rent.

In an affidavit submitted almost immediately before the issuance of this opinion and order, the City conceded that if plaintiff Garcia had requested a hearing within seven days, she would have been entitled to a hearing. The City's records did not, however, indicate whether such a timely request had been made.

Mrs. Rodriguez' employment was "verified by Alexander's Department Store," and although this plaintiff attests that she did not hold such a job, the City concludes that there was "no question of fact" and the reduction was thus mandated by law. Defendant Wyman's position with regard to these plaintiffs is that the State regulation, 18 N.Y.C.R.R. § 351.26, is not challenged on constitutional grounds and that the State has no duty to supervise the local agency's practices with regard to pretermination hearings.

I. Jurisdiction

Plaintiffs allege that, among other grounds, the jurisdiction of the Court is founded upon 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1343(3) (1970). In welfare cases such as this one, jurisdiction under § 1343(3) will properly lie so long as a colorable constitutional claim is raised. *Lewis* v. *Martin*, 397 U.S. 552 (1970); *Dandridge* v. *Williams*, 397 U.S. 471 (1970); *Rosado* v. *Wyman*, 397 U.S. 397 (1970); *King* v. *Smith*, 392 U.S. 309 (1968); *Compagnuolo* v. *Harder*, 440 F.2d 1225 (2d Cir. 1971); *Johnson* v. *Harder*, 438 F.2d 7 (2d Cir. 1971). The Court finds that the facts as set forth present a colorable constitutional claim under the Due Process requirements for pretermination hearings which the Supreme Court established in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Although *Goldberg* is distinguishable from the present case in that it involved terminations, rather than reductions, of welfare benefits the constitutional claim is colorable nonetheless. In fact, it would appear that the logic of *Goldberg* would extend to reductions of welfare benefits,[5] as for example, in the

[5] *See Goldberg* v. *Kelly*, 397 U.S. 254, 264 (1970):

> Thus the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

case of Mrs. Almenares where the reduction was so substantial as to create a situation not unlike complete termination. Thus, the Court finds that a colorable constitutional claim was presented and jurisdiction in this case is properly founded upon 28 U.S.C. § 1343(3).

Defendant Wyman seeks to avoid the effect of this determination by asserting that the constitutional claim presented by plaintiffs is based on the local agency's, rather than the State's, actions. Further, defendant Wyman denies an affirmative duty to supervise the local agency's hearing procedures. The plaintiffs assert that defendant Wyman is implicated on the constitutional claim against the City because defendant Sugarman is merely an agent of the State. For purposes of determining this application for a preliminary injunction, the Court finds that under the New York statute defendant Wyman is responsible for supervising defendant Sugarman's conduct and, therefore, the constitutional claim asserted against the City states a claim against the State, as well. The State Department of Social Services is charged with supervising local welfare departments and their officials, N. Y. Social Services Law, § 20(2)(b), 3(a), 3(f) (McKinney 1966). The State Commissioner is specifically required to exercise general supervision over the local agencies, N. Y. Social Services Law, § 34(3)(d), (e) (McKinney 1966). Furthermore, the Social Security Act requires a State plan to provide for the establishment of a single State agency to administer, or to supervise the administration of the assistance program. 42 U.S.C. § 602(a)(3), § 1382(a)(3) (1970). In conclusion, both the State and the federal statutory schemes set forth defendant Wyman's responsibility for defendant Sugarman's conduct and procedures. Plaintiffs have stated a colorable constitutional claim against both defendants and jurisdiction is found to exist as to defendant Wyman, as well as to defendant Sugarman.

Appendix A

Having found that jurisdiction is established under § 1343(3) on the constitutional claim, the Court assumes pendent jurisdiction over the statutory claim. *Dandridge* v. *Williams*, 397 U.S. 471, 475-6 (1970); *Wyman* v. *Rothstein*, 398 U.S. 275 (1970) (*per curiam*); *Wilczynski* v. *Harder*, 323 F.Supp. 509, 514 (D. Conn. 1971); *Solman* v. *Shapiro*, 300 F.Supp. 409 (D. Conn. 1969), *aff'd mem.*, 396 U.S. 5 (1969).

II. Administrative Remedies

Defendant Wyman has further argued that the Court should decline to exercise its jurisdiction in this case so as to allow the Department of Health, Education and Welfare (HEW) to resolve the regulatory conflict with the State. Specifically, the State suggests that judicial review would only be available following a conformity hearing pursuant to 42 U.S.C. § 1316 (1970). The Supreme Court rejected this argument in *Rosado* v. *Wyman*, 397 U.S. 397, 406 (1969), noting that "HEW has no procedures whereby welfare recipients may trigger and participate in the Department's review of state welfare programs."

Defendant Wyman seeks to distinguish the present situation from the one before the Court in *Rosado* by citing a recent decision in which welfare recipients were granted the right to intervene in an HEW conformity hearing. *National Welfare Rights Organization* v. *Finch*, 429 F.2d 725 (D.C. Cir. 1970). Regulations issued by HEW subsequent to that decision confirm that welfare recipients may now participate in hearings, if they demonstrate a requisite interest in the proceedings. 45 C.F.R. § 213.15 (1971). This regulation cures part of the difficulty which the Court noted in *Rosado*, namely, welfare recipients may now participate in HEW's review of State welfare programs. However, the other part of the problem considered in *Rosado* remains unremedied. It is still not possible for welfare

recipients to "trigger" HEW's review procedure. Perhaps a different case would be presented if HEW had initiated a conformity hearing in this State and it only remained for plaintiffs to file a petition to participate. This is not, however, the situation before the Court. A conformity hearing has not been initiated by HEW, and plaintiffs cannot cause HEW to take such action. In these circumstances, the rationale stated in *Rosado* remains valid and applicable. Therefore, this Court will not decline to exercise its jurisdiction to adjudicate the grievances of these plaintiffs.

III. Class Action

Before turning to the merits, the Court will consider the question of whether this case should properly proceed as a class action. Plaintiffs seek to represent all recipients under New York State's programs of Aid to Families with Dependent Children (AFDC) and Aid to the Aged, Blind and Disabled (AABD). The Court finds that the prerequisites and requirements of Rule 23(a) and (b), Fed.R.Civ.P., have been met. First, it is alleged that there are approximately 1,500,000 recipients of AFDC and AABD benefits in New York State. Joinder of all members of the class would, of course, be impracticable.

Second, questions of law and fact common to the class have been presented. In particular, on the statutory claim, the applicability of the State or federal regulation for fair hearings is a question of law common to the class throughout the State. On the constitutional claim, procedures of local agencies throughout the State are challenged.

Third, the claims of the representative parties are typical of the claims of the class. It appears that these plaintiffs' claims upon reduction of benefits without a State hearing are no different than would be the claims of other welfare recipients throughout the State. The Court also finds no

difficulty with the fact that the named plaintiffs are AFDC recipients seeking to represent both AFDC and AABD recipients. The distinctions which lead to different classifications in assistance categories are not distinctions of any bearing upon the legal issues in this case. In sum, the requirement of typical claims has been met.

Fourth, the Court further finds that the named plaintiffs will fairly and adequately protect the interests of the class. Although temporary relief was granted by consent of defendants to each of the named plaintiffs, each continues to have an underlying stake in the issues litigated in this case. Specifically, the temporary relief was granted without a resolution of the City's assertion of ineligibility in each case. Unless this suit were diligently and successfully prosecuted, each could expect to have her grant reduced without further review. Furthermore, the Court takes note of the fact that the attorneys representing plaintiffs in this case are public service legal organizations experienced in litigation of this nature. It may be presumed that they will represent plaintiffs in a fashion that will fairly and adequately protect the interests of the class.

Finally, the Court finds that Rule 23(b)(2) is satisfied in this case in that defendants have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." This requirement is met in that plaintiffs challenge the State's enforcement of a fair hearing regulation which does not comport with the federal fair hearing regulation. This action—the enforcement of the State regulation by the defendants—is taken on grounds generally applicable to the class. Furthermore, a class action may be maintained under Rule 23(b)(2) even though plaintiffs seek money damages in addition to injunctive and declaratory relief. *Doe* v. *Shapiro*, 302 F.Supp. 761 (D. Conn. 1969),

appeal dismissed, 396 U.S. 488 (1970); *Solman* v. *Shapiro*, 300 F.Supp. 409 (D. Conn. 1969), *aff'd mem.*, 396 U.S. 5 (1969).

The requirements of Rule 23 have been met, and, accordingly, this suit may properly proceed as a class action. In addition to this determination, plaintiffs also seek an order that they may proceed against defendant Sugarman as a class representative of the State's sixty-four local social services commissioners. Although Rule 23 allows suits against defendants as class representatives, the requirements of the Rule are not fully met in this case. On the constitutional claim, the defenses of defendant Sugarman may not be typical of the defenses of the other local commissoners. They may have promulgated regulations and adopted practices quite different from those attacked by plaintiffs in this case. Furthermore, under subsection (b), plaintiffs claim that "separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class." This, however, is not a real possibility in this case since the plaintiffs have joined defendant Wyman in the suit and, under his supervisory duties prevously detailed, standards set up with regard to defendant Sugarman would become applicable for local commissoners throughout the State. For these reasons, the Court denies plaintiffs' request to proceed against defendant Sugarman as a class representative.

IV. Statutory Claim

In order to avoid reaching the constitutional issue unnecessarily, the statutory claim will be considered first. *Wyman* v. *Rothstein*, 398 U.S. 275 (1970) (*per curiam*); *Rosado* v. *Wyman*, 397 U.S. 397 (1970); *King* v. *Smith*, 392 U.S. 309 (1968). The essence of the statutory claim is that

the defendants have failed to implement the recently promulgated HEW regulation governing fair hearings, 45 C.F.R. § 205.10, 36 Fed. Reg. 3034 (1971). Instead, they have continued to follow the New York State regulation[6] which predated the new federal provision.

The two regulations are inconsistent with each other in several respects. The primary difference in dispute here is that the State regulation provides for a local agency hearing before reduction or termination of benefits, while the federal regulation requires that a State fair hearing must be held prior to curtailment of benefits. The State practice has been to provide an informal hearing before a review officer employed by the local agency. The regulation governing this procedure requires timely and adequate notice, an opportunity to be heard and to confront adverse witnesses, the right to be represented by counsel, and a decision setting forth the reasons for the determination. Under the regulation, assistance cannot be curtailed prior to the date on which notice of the decision is sent to the welfare recipient. If the decision is adverse, the recipient can seek review at a State fair hearing, an administrative review specifically required by the Social Security Act, 32 U.S.C. § 602(a)(4) (1970). The State hearing is judicial in nature, rather than informal. It is held before a State official; a record of the proceedings is transcribed; and a formal opinion, including findings of fact, is handed down. Since benefits may be curtailed after the local hearing, the recipient is not receiving the grant which is the subject of dispute during the time he is awaiting his State fair hearing.

In contrast, the federal regulation provides for only one review—the State fair hearing—and assistance must be continued until that review is completed. Thus, the State

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[6] *See* note 2, *supra*.

procedure is at variance with the federal requirement at least to the extent that benefits are altered before the State fair hearing occurs. In adopting the federal regulation, HEW was not unaware of procedures like those in New York State. It, nevertheless, chose the single State hearing requirement, for reasons of economy and impartiality.[7]

It is not disputed that the federal regulation, if valid, is binding upon the State. *Lewis* v. *Martin*, 397 U.S. 552 (1970); *Boddie* v. *Wyman*, 434 F.2d 1207 (2d Cir. 1970), *aff'd mem.*, 402 U.S. 991 (1971); *Solman* v. *Shapiro*, 300 F.Supp. 409 (D. Conn. 1969), *aff'd mem.*, 396 U.S. 5 (1969). Defendant Wyman challenges the validity of the regulation on two grounds. First, it is asserted that the regulation conflicts with the Social Security Act's provisions for local administration, 42 U.S.C. § 602(a)(3) (1970). Second, it is

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[7] An HEW memorandum, dated February 13, 1971, set forth the rationale of the single-hearing requirement, as follows:

> 1. Holding one hearing, rather than a local hearing followed by a State hearing, will, in our view, be less costly in time and money.
> 2. Greater impartiality, objectivity and uniformity in the application of State policies is assured when the hearing is not before the agency that made the decision being appealed.
> 3. The individual and those appearing on his behalf will be subject to only one hearing.
> 4. This hearing process is closely akin to that which would be required under the Family Assistance Plan.
> 5. The State agency should be better able to interpret State policies and to determine whether they were correctly applied to the individual's situation, especially when the claimant challenges the correctness of the local agency's application of those policies.
> 6. A single hearing can be a means for improving hearing procedures and for shortening the time for the total process which, in some States, now exceeds the Federal standard of 60 days.

claimed that the regulation goes beyond HEW's rule-making powers, 42 U.S.C. § 1302 (1970).

As to the first contention, defendant directs the Court's attention to § 602(a)(3), which reads as follows:

> A State plan for aid and services to needy families with children must either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan.

Defendant's argument is that the statute allows for the option of local administration and, therefore, the federal fair hearing regulation conflicts with this provision because it places the responsibility for the hearing upon the State. As a matter of statutory interpretation, the Court finds this argument to be unpersuasive. It would be necessary to read a great deal into § 602(a)(3) in order to find that it forbids HEW to place a particular responsibility upon the State rather than upon the local agencies. On the face of the statute, the Congressional mandate merely appears to be for the general administration of welfare plans at the local level. This does not forbid the administrative agency from devising regulations which place specific duties upon the State agency. Furthermore, defendant cites no authority either in legislative history or judicial interpretation, which supports the reading of the statute presently urged upon this Court. Therefore, the Court concludes that the federal regulation is not invalid on the grounds that it conflicts with the Social Security Act § 602(a)(3).

The second argument against the validity of the regulation is that its promulgation exceeded HEW's rule-making powers. Those powers are delineated in 42 U.S.C. § 1302, as follows:

> [T]he Secretary of Health, Education, and Welfare . . . shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which [the Secretary] is charged under this chapter.

Essentially, defendant Wyman argues that HEW went beyond its rule-making power because it was implementing the Supreme Court's decision in *Goldberg* v. *Kelly, supra,* rather than the Social Security Act. The Court finds this position to be untenable. Even where a statute does not affirmatively indicate an intent to establish a regulation such as the one in question, if the grant of authority is sufficiently broad, the regulation will be considered to be authorized. *Zemel* v. *Rusk,* 381 U.S. 1 (1965). Furthermore it is well recognized that deference must be given to the regulations promulgated by the agency charged with administering a statute. *Lewis* v. *Martin,* 397 U.S. 552 (1970); *Zemel* v. *Rusk,* 381 U.S. 1 (1965); *Conn. State Dept. of Public Welfare* v. *HEW,* —— F.2d ——, Slip. op. 1574 (2d Cir. Sept. 3, 1971); *Boddie* v. *Wyman,* 434 F.2d 1207 (2d Cir. 1970), *aff'd mem.,* 402 U.S. 991 (1971). Finally, in a recent Second Circuit case, the standard for testing the validity of an HEW regulation was said to be whether the regulation was "unreasonable" and "contrary to the Act." *Connecticut State Department of Public Welfare* v. *HEW, supra.* Applying those standards here, the Court concludes that the defendant failed to make such a showing and, thus, the federal fair hearing regulation must be deemed valid and binding upon the State.

V. Relief

This being the Court's view of the statutory claim, it is unnecessary to go on to consider the constitutional claim.

Appendix A

For the purposes of a preliminary injunction,[8] the Court finds that the plaintiffs have demonstrated a probability of success on the merits. As to the requirement of irreparable harm, there can be little doubt that plaintiffs and the class they represent will suffer irreparable harm if an injunction does not issue. Even though the assistance payments withheld herein can be restored to the recipient, the harm caused to an eligible welfare recipient during the period of such termination or reduction is irreparable indeed. For the children of persons eligible to receive AFDC grants, the period of time might well mean deprivation of basic human needs.

Weighed against these possibilities is the potential harm to defendants which in this case constitutes the expenditure of monies. It will not be necessary for defendants to dismantle administrative procedures or to create new ones. The present structure of local and state hearings can be maintained. The defendants must only continue assistance payments during the interim between the local and state hearings.

Plaintiffs' motion for a preliminary motion is hereby granted. Defendant Wyman, his successors in office, agents and employees, and those persons in active concert with them, including local social services officials administering AFDC and AABD programs under State supervision, insofar as said officials have actual notice of this order, and defendant Sugarman, his successors in office, agents and employees, and those persons in active concert with him, are hereby restrained from terminating, suspending or reducing public assistance benefits in the federally-aided programs of Aid to Families with Dependent Children and Aid to the Aged, Blind and Disabled, until an

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[8] It should be emphasized that the conclusions are made only for the purpose of deciding the motions before us and are not determinative of the merits of the case.

opportunity is afforded for a fair hearing comporting with the requirements of 45 C.F.R. §.205.10, 36 Fed. Reg. 3034 (1971) insofar as it applies to the issues raised by plaintiffs in this case, or until this Court determines that defendant Wyman or his successor in office has promulgated regulations implementing the federal regulation, insofar as it applies to the issues in this case, and that defendant Wyman or his successor has developed a suitable method to monitor local compliance with such regulation.

The Court further orders defendants Wyman and Sugarman, their successors in office, agents and employees, and those persons in active concert with them, to immediately resume full assistance for all recipients under the AFDC and AABD programs who have had their assistance reduced, suspended or terminated since April 14, 1971 and have requested a fair hearing from the New York State Department of Social Services and who have not yet had a decision on their fair hearing.

The motions of the eight welfare recipients seeking to intervene in this suit, pursuant to Rule 24(b), Fed. R.Civ.P., are granted.

This opinion constitutes the Court's findings of fact and conclusions of law pursuant to Rule 52(a) Fed. R.Civ.P.

So Ordered.

Dated: New York, New York, November 3, 1971.

Lawrence Pierce,
U.S.D.J.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 383—September Term, 1971.

(Argued November 12, 1971 Decided December 10, 1971.)

Docket No. 71-2038

MARIA ALMENARES, CRESENCIA GARCIA, and JANET RODRIGUEZ individually, on behalf of their minor children, and on behalf of all others similarly situated,

Plaintiffs-Appellees,

against

GEORGE K. WYMAN, Commissioner of Social Services for the State of New York, individually and in his official capacity, and JULE SUGARMAN, Commissioner of Social Services for the City of New York, individually, in his official capacity, and on behalf of all other local commissioners of social services in the State of New York, individually and in their official capacities,

Defendants-Appellants.

Before:

FRIENDLY, *Chief Judge,*
FEINBERG, *Circuit Judge,* and DAVIS, *Associate Judge.**

Appeal from an order of the District Court for the Southern District of New York, Lawrence W. Pierce, *Judge,*

*Of the United States Court of Claims, sitting by designation.

granting an injunction in an action by recipients of AFDC benefits.

Order affirmed as modified but injunction temporarily stayed on conditions.

HENRY A. FREEDMAN, Esq. (Steven J. Cole, Esq., c/o Center on Social Welfare Policy and Law, Lorenzo Casanova, Esq., and Gerald McIntyre, Esq., c/o Bronx Legal Services Corporation B, of Counsel), *for Appellees.*

EMILIO P. GAUTIER, Esq. (Louis B. York, Esq., c/o Manhattan Legal Services Corporation, John C. Gray, Esq., and Robert A. Jaffee, Esq., c/o Brooklyn Legal Services Corporation B, of Counsel), *for Intervenors.*

STEPHEN P. SELIGMAN, Esq., Assistant Attorney General (Samuel A. Hirshowitz, Esq., First Assistant Attorney General, and Louis J. Lefkowitz, Esq., Attorney General of the State of New York, of Counsel), *for Appellant Wyman.*

YVETTE G. HARMON, Esq. (J. Lee Rankin, Esq., Corporation Counsel for the City of New York, of Counsel), *for Appellant Sugarman.*

FRIENDLY, *Chief Judge:*

I.

This case begins where *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), ends. The Court there held that local social service agencies must provide welfare recipients an opportu-

nity for a hearing affording basic due process rights before terminating benefits. Plaintiffs here allege that the hearing procedures actually employed by defendants with respect to review of local agency action terminating, suspending or reducing their Aid to Families with Dependent Children (AFDC) benefits failed to meet the due process requirements enunciated in *Goldberg*, and further that the procedures are in conflict with those prescribed by the United States Department of Health, Education and Welfare (HEW) subsequent to *Goldberg*, 45 C.F.R. § 205.10, 36 Fed. Reg. 3034 (1971), implementing the "fair hearing" requirement of the Social Security Act, 42 U.S.C. §§ 602 (a)(4), and 1202(a)(4), through its rule making power, 42 U.S.C. § 1302.

After the decision in *Goldberg* and for the purpose of complying with it, the New York State Department of Social Services modified its regulation governing hearing procedures by providing for a local agency hearing affording basic due process rights. 18 N.Y.C.R.R. § 351.26.[1] Plaintiffs do not challenge the constitutionality of this regulation. The New York City Department of Social Services (City) also modified its announced procedures. At the time of the events here in question, the City's hearing procedures were set forth in Procedure No. (P. No.) 71-21,

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[1] Since the district court in *Kelly* v. *Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968), *aff'd sub nom. Goldberg* v. *Kelly*, 397 U.S. 254 (1970), upheld the constitutionality of one option of the New York State procedure, 18 N.Y.C.R.R. § 351.26(a) (1968), providing for local social service pre-termination agency hearings which, the district court concluded, met the minimum requirements of due process, the State simply repealed the optional procedure used by New York City which the courts had struck down, 18 N.Y.C.R.R. § 351.16(b) (1968). At the same time, the State made minor modifications in the valid option to satisfy earlier HEW complaints.

replaced by P. No. 71-35 (effective September 30, 1971)[2] prior to such action, the affected recipient must be afforded an opportunity for a local agency hearing which, at least on the face of the Procedure, would seem to comport with the constitutional requirements enunciated by the *Goldberg* majority for cases of discontinuance.[3] In the event of adverse action the affected recipient is entitled to a post-reduction, suspension or discontinuance State "fair hearing" which affords due process procedural safeguards. See *Goldberg v Kelly, supra,* 397 U.S. at 259-60; see also N. Y. Social Welfare Law §353 (McKinney 1966); 18 N.Y.C.R.R. §§ 84.2-84.23.

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[2] The record is silent on the City's procedure between March 23, 1970, the date of the Court's decision in *Goldberg,* and April 26, 1971, the effective date of P. No. 71-21. P. No. 71-35 which replaces P. No. 71-21 leaves the details of the local hearings unchanged. One notable difference between them can be found in the "Purpose" sections. P. No. 71-21, after announcing that the procedure is designed to protect clients' rights, states that it "in no way limits client's right to request a [State] Fair Hearing, in accordance with existing policy and requires that assistance be continued until completion of the administrative review." This could certainly be read as requiring continuation of benefits until the completion of a State fair hearing. Clearly, the City has not so interpreted it, and such an interpretation would be in conflict with existing State regulations. The "Purpose" section of P. No. 71-35, possibly with this difficulty in mind, makes clear that benefits are affected after an adverse decision by the City's reviewing officer. which provided that "in cases where it is proposed that assistance be reduced, suspended or discontinued," and

[3] This statement of conformity with *Goldberg* is subject to one important qualification. The Procedure did not require notification to the client where "Discontinuance of assistance or reduction of client's budget is mandated by law." Many of the difficulties that have arisen apparently stem from the Department's seeking to avail itself of this exception in cases where there was a dispute whether on the facts the legal mandate had been triggered—a situation obviously within the reach of *Goldberg* when discontinuance is proposed.

The City procedures provide for seven days advance notice, a period held constitutionally sufficient in *Goldberg,* 397 U.S. at 268.

Appendix B

Even prior to the decision in *Goldberg* v. *Kelly, supra,* HEW had been reconsidering its regulation dealing with state "fair hearings" under the various "categorical assistance" programs to which the Federal Government contributes.[4] On February 13, 1971, HEW published new regulations effective April 14, 1971, 45 C.F.R. § 205.10, 36 Fed. Reg. 3034 (1971). These directed that each State plan under the categorical assistance programs must contain provisions whereby, *inter alia:*

(1) Every claimant would be informed in writing at the time of his application for assistance and at the time of any action affecting his claim, of his right to a fair hearing and the method for obtaining one;

(2) An opportunity for a hearing *before the State agency* shall be granted to any individual requesting a hearing because his claim has been denied or not acted upon with reasonable promptness or "because he is aggrieved by any other agency action affecting receipt, suspension, reduction, or termination of such assistance or by agency policy as it affects his situation";

(3) Notice of proposed action must be given fifteen days in advance;

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[4] At the time of the *Goldberg* decision the "fair hearing" requirement of the Social Security Act, 42 U.S.C. § 602(a)(4), as implemented by HEW regulations then in effect, was satisfied by a post-termination hearing. 397 U.S. at 275 n. 3. Prior to the Court's decision (and as noted therein, *id.*) HEW proposed a regulation, largely embodying the due process requirements enunciated in *Goldberg,* requiring a state "fair hearing" prior to termination, reduction or suspension of benefits. 45 C.F.R. § 205.10, 34 Fed. Reg. 1144 (1969). That regulation was scheduled to take effect in July 1970; it was revoked, however, before taking effect when a new regulation was published for comment in May 1970. 45 C.F.R. § 205.10, 35 Fed. Reg. 8448 (1970). After several months of study by HEW, and extensive comments by "interested organizations, agencies, and individuals," the new regulation was published.

Appendix B

(4) Assistance must be continued "until the fair hearing decision is rendered and through a period consistent with the State's established policies for issuance of payments unless a determination is made by the State agency, in accordance with criteria issued by the Social and Rehabilitation Service, that the issue is one of State agency policy and not one of fact or judgment relating to the individual case, including a question whether the State agency rules or policies were correctly applied to the facts of the particular case."

Concededly the City and State of New York, have not complied with so much of the regulation as forbids discontinuance, suspension or reduction of benefits until after an adverse decision at the *State* fair hearing; they take such action once the City has acted, with the claimant entitled to review by the State agency but with his benefits affected in the meanwhile.[5]

The plaintiffs in this action are three women recipients of AFDC benefits. Maria Almenares received a letter from the City dated July 12, 1971, advising that on July 16, her semi-monthly grant of $120.50 would be reduced to $6.35 because of non-payment of rent, which she alleged she was withholding pursuant to N.Y. Real Property Action and Procedure Law § 755, and receipt of support money from her husband, the extent of which she denied; allegedly no opportunity for a hearing, State or local, was offered. Cresencia Garcia received notice dated April

[5] After the bringing of this action by AFDC recipients in the Southern District of New York, the New York State Commissioner of Social Services brought an action in the Northern District seeking a declaration that the HEW regulation was unauthorized insofar as it required review by a state rather than a local agency before benefits under a categorical assistance program could be adversely affected.

14, 1971, that her grant would be reduced as of May 16—in fact, she alleges that, without further notice, the reduction became effective on May 1—from $117 semi-monthly to $93.60 because of alleged endorsement of checks which she claimed she had not received. Local agency review was not had until July 9, after assistance had already been reduced; the decision was adverse but Mrs. Garcia claimed the hearing did not afford due process because the hearing examiner was not impartial and because she was denied the right to confront the evidence against her. Janet Rodriguez received notice early in July, 1971, that her semi-monthly grant of $117.30 would be suspended (later modified to a reduction to $27.45) because she had been working, a fact which she denied. No pre-termination or pre-reduction hearing, State or local, was afforded since, as the City now asserts, discontinuance or reduction was "mandated by law," see note 3, *supra*. Before decision of the motion for a preliminary injunction, eight other recipients of AFDC benefits were allowed to intervene. Allegedly four had suffered or were threatened with termination and four with substantial reductions of their grants. Six had been advised of their right to a City hearing and four had received this; the others claimed they had not been so advised. All those who had received hearings alleged that these did not comply with due process. Five of the eight allegedly had assistance reduced or terminated prior to any hearing.

The complaint was brought against George K. Wyman, Commissioner of Social Services of the State of New York, and Jule Sugarman, Commissioner of Social Services for the City.[4] Plaintiffs sought to represent all recipients of public assistance benefits under the federally

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[4] The complaint alleged that Sugarman was also sued "on behalf of all other local commissioners of social services in the State of New York."

aided AFDC and Aid to the Aged, Blind and Disabled (AABD) programs.[7] They contended that the actions of the City with respect to their AFDC benefits were in violation of due process, as explicated in *Goldberg* v. *Kelly*, *supra*, and also that termination or reduction of their benefits prior to decision in a State fair hearing violated the HEW regulations. On a motion for a preliminary injunction, the district court held, in an opinion filed November 3, 1971, that the complaint stated colorable constitutional claims over which it had jurisdiction pursuant to 28 U.S.C. § 1343(3); that consequently it had "pendent" jurisdiction over the claim of violation of the HEW regulation, without need to consider jurisdictional amount; that the claim relating to violation of the HEW regulations might properly be prosecuted as a class action under F.R.Civ.P. 23 (b) (2) for injunctive and declaratory relief against the two named defendants but not against other local administrators, see note 6, *supra;* and that the HEW regulations were valid. It entered an order which restrained defendants from terminating, suspending or reducing AFDC or AABD benefits "until an opportunity is afforded for a fair hearing comporting with the requirements of 45 C.F.R. § 205.10, 36 Fed. Reg. 3034 (1971) insofar as it applies to the issues raised by the plaintiffs in this case, or until this Court determines that defendant Wyman or his successor in office has promulgated regulations implementing the federal regulation, insofar as it applies to the issues in this case, and that defendant Wyman or his

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[7] Although plaintiffs and intervenors receive only AFDC benefits, and not AABD benefits, the district court found plaintiffs' representative of recipients in the latter program as well. Since HEW's hearing regulation, 45 C.F.R. § 205.10, 36 Fed. Reg. 3034 (1971), applies equally to both federally-aided programs, it was within the district court's discretion to permit plaintiffs to represent both groups so long as the requirements of F.R.Civ.P. 23 were otherwise met.

successor has developed a suitable method to monitor local compliance with such regulation." The order also directed the defendants to resume full assistance to all recipients under the AFDC and AABD programs whose assistance had been reduced, suspended or terminated since April 14, 1971, and had requested a fair hearing from the New York State Department of Social Services but had not yet had a decision thereon.

On November 8, we heard a motion by defendant Wyman requesting a stay of the injunction pending appeal.[8] He represented that a change from local to state disposition at the first instance would create serious administrative difficulties and that the court's order would require restoration or prevent withdrawal of benefits in thousands of cases where termination or reduction had been or would be effected in full compliance with constitutional standards. We granted a stay, first pending expedited hearing of the appeal on November 12, and then pending decision, on condition that the plaintiffs and intervenors should continue to receive full benefits.

II.

Like other cases in the welfare area, this one raises a congeries of jurisdictional issues, arising mainly from the fact that the jurisdictional amount requirement, 28 U.S.C. § 1331 (a), is inapplicable to claims under the Civil Rights Act but is to "general federal question" claims.

The first question is whether, assuming for the moment that the complaint stated a substantial constitutional claim, the "right or immunity" allegedly infringed is, in the language of Mr. Justice Stone in *Hague* v. *C.I.O.*, 307 U.S. 496, 531 (1939), which we followed in *Eisen* v. *Eastman*,

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[8] Defendant Sugarman also appealed but filed no brief and took no position concerning the stay.

421 F.2d 260 (2 Cir. 1969), "one of personal liberty, not dependent for its existence upon the infringement of property rights," so as to come within the jurisdictional statute, 28 U.S.C. § 1343(3), implementing the Civil Rights Act, 42 U.S.C. § 1983. Judge Smith's opinion in *Johnson* v. *Harder*, 438 F.2d 7 (2 Cir. 1971), see also *Campagnuolo* v. *Harder*, 440 F.2d 1225 (2 Cir. 1971), opens up the problems with respect to the viability of Justice Stone's test in welfare cases arising from the Supreme Court's unexplicated assumption of § 1343(3) jurisdiction not only in *King* v. *Smith*, 392 U.S. 309 (1968), the only such case which, at the time of the *Eisen* decision, appeared to create any difficulty, but in many subsequent ones. See *e.g.*, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Goldberg* v. *Kelly*, *supra*; *Rosado* v. *Wyman*, 397 U.S. 397 (1970); *Dandridge* v. *Williams*, 397 U.S. 471 (1970); *Lewis* v. *Martin*, 397 U.S. 552 (1970). While it is not hard to view total or substantial withdrawal of benefits from families living near the edge of subsistence as coming within Justice Stone's formulation, as we suggested in *Eisen*, see 421 F.2d at 564, and held in *Johnson* v. *Harder*, *supra*, that principle would not necessarily cover every adverse alteration of benefits, no matter how small in amount or limited in duration. We find it unnecessary here to work out the puzzle arising from the Court's unquestioning assumption of § 1343(3) jurisdiction in all welfare cases that have come before it and its apparent continued adherence to the personal-property rights distinction in other suits alleging unconstitutional state action, see *Abernathy* v. *Carpenter*, 208 F. Supp. 793 (W.D. Mo. 1962), *aff'd per curiam*, 373 U.S. 241 (1963); *Alterman Transportation Lines* v. *Public Service Comm'n*, 259 F. Supp. 486 (M.D. Tenn. 1966), *aff'd per curiam*, 386 U.S. 262 (1967); and *Hornbeak* v. *Hamm*, 283 F. Supp. 549 (M.D. Ala.), *aff'd per curiam*, 393 U.S. 9 (1968). Cf. *Harrison* v. *Brooks*, 446 F.2d 404 (1 Cir. 1971). For some of the plaintiffs and intervenors did allege

total or serious curtailments in benefits which had been fixed to provide the minimum needed for subsistence.

The second jurisdictional question is the one we assumed for purposes of deciding the first, to wit, whether the complaint asserted a substantial constitutional claim[9] so as to afford jurisdiction under 28 U.S.C. § 1343(3) if other conditions were met. It is too clear for argument that a claim that a state or one of its municipalities had terminated AFDC benefits without the kind of hearing required by *Goldberg* would be substantial, even though their regulations had been revamped so that on their face they complied with that decision; the claim would be of unconstitutionality as applied. What is not so clear is that *Goldberg* requires a hearing in advance of action when benefits are simply *reduced*. The Chief Justice raised this question in a dissent joined by Mr. Justice Black, see *Wheeler* v. *Montgomery*, 397 U.S. 282, 284-85 (1970). While the majority did not then answer the question, two months later the Court, in reversing and remanding a judgment which invalidated a reduction of benefits in advance of a *Goldberg* type hearing, recognized that the question might—or might not—receive a different answer. *Daniel* v. *Goliday*, 398 U.S. 73 (1970). Whatever the ultimate answer may be,

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[9] We regard this as essential for jurisdiction under § 1343(3) in the circumstances here presented, since in our view the Social Security Act is not an "Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." *Cf. Rachel* v. *Georgia*, 384 U.S. 780, 792 (1966); *City of Greenwood* v. *Peacock*, 384 U.S. 808, 825 (1966).

Plaintiffs' reliance on 28 U.S.C. § 1343(4) is foreclosed so far as this circuit is concerned. *McCall* v. *Shapiro*, 416 F.2d 246 (2 Cir. 1969). Their invocation of 28 U.S.C. § 1337 is even more patently without merit since the Social Security Act is not an act "regulating commerce or protecting trade and commerce against restraints and monopolies." And the ritual incantation of the Declaratory Judgment Act, 28 U.S.C. § 2201, as a basis for jurisdiction, so often encountered in welfare and other cases, comes at least twenty years too late. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950).

the constitutional *question* remains substantial, all that is here required. See *Merriweather* v. *Burson*, 439 F.2d 1092, 1093 (5 Cir. 1971). Moreover, as indicated above, at least some of the claims here at issue involve total or nearly total discontinuance.

We thus reach the question whether the district court properly held the statutory claim to be "pendent"[10] to the constitutional claim so as to be cognizable irrespective of the requirement of 28 U.S.C. § 1331 concerning jurisdictional amount.[11] The State does not seriously question that the constitutional and statutory claims have the "common nucleus of law and fact" demanded by *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966) or that, absent a jurisdictional barrier, a plaintiff having a constitutional claim of the sort here asserted would "ordinarily be expected" also to try his statutory claim "in one judicial proceeding." *Id.*

Its principal contention against pendency is rather that the constitutional claims lay only against Sugarman, the City Commissioner, because of the City's alleged violations of the State-approved procedures, and thus would not support a pendent statutory claim against Wyman, the State Commissioner. The district court answered this by concluding that under both state and federal statutes, N.Y. Social Services Law §§ 20(2)(b), (3)(a) and (3)(f), 34(3)(d) and (e), and 42 U.S.C. §§ 602(a)(3) and § 1382(a)-(3), the State Commisioner is responsible for the conduct and procedures of local officials. While this may

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[10] We use the quotation marks because there is a certain anomaly in applying this word to a federal claim. However, the usage has the highest sanction. See *Rosado* v. *Wyman*, 397 U.S. 397, 405 (1970).

[11] In view of our holding on this point we are not required to determine whether the claims of plaintiffs and other members of their class concerning the invalidity of the New York procedures in light of the HEW regulation constitute "a single title or right in which they have a common and undivided interest." *Snyder* v. *Harris*, 394 U.S. 332, 335 (1969), so as to permit aggregation.

well be so, we need not base decision on that ground. For as we have recently held, the doctrine of pendent jurisdiction is sufficiently broad to support a claim within the limits of *Gibbs* against a person not a party to the primary, jurisdiction-granting claim. See *Astor-Honor, Inc.* v. *Grosset & Dunlap, Inc.*, 441 F.2d 627 (2 Cir. 1971); *Leather's Best, Inc.* v. *S.S. Mormaclynx*, —— F.2d —— (2 Cir. 1971), slip opinions at 247, 258-59.

Given this, there is no doubt that the record plaintiffs and intervenors should have been allowed to litigate their own statutory claims against the named defendants irrespective of jurisdictional amount. However, a further problem here arises from the ruling permitting plaintiffs to maintain the statutory claim as a class action. In contrast to *Rosado* v. *Wyman, supra*, where both the constitutional and statutory claims were allowed to be maintained as class actions, and apparently the class of plaintiffs on both issues was coextensive, here, as we read the district court's opinion, it granted such status only to the statutory claims, which it held to meet squarely the criterion of F.R.Civ.P. 23(b)(2), namely, that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Whether or not the constitutional claims were appropriate for class action treatment, an issue we need not decide,[11a] the *Gibbs*

[11a] It could be strongly argued that class action treatment was allowable, particularly for all welfare recipients aggrieved by the City's Procedure referred to in fn. 3. On the other hand, the class for this or any other constitutional claim would have had to be limited to New York City welfare recipients, since the papers did not allege *Goldberg* violations elsewhere in the State, whereas the class designated on the statutory claim was state-wide. Consequently, even if the district court were thought to have granted class action status to the constitutional claims, and to have done so with propriety, we would be left with a problem not dissimilar to that hereafter considered.

test for pendency, requiring a "common nucleus of operative facts," is satisfied since plaintiffs and all members of their class share one essential thing in common—their benefits have been or will be terminated, reduced or suspended prior to a State hearing unless relief is afforded.

The effect of permitting the "pendent" statutory claim to proceed as a class action is, however, to adjudicate the claims of some persons who, in the absence of an affirmative holding on the point concerning jurisdictional amount noted on fn. 11, *supra,* could not themselves have invoked the jurisdiction of the federal courts. Whether, in light of this, the district court should have permitted the plaintiffs to maintain their statutory claim as a class action "involves two discrete inquiries: whether the court has the 'power' to hear the [pendent] claim; and whether, assuming the power, the court should, as a matter of 'discretion,' hear the pendent claim." *Leather's Best, Inc. v. S.S. Mormaclynx, supra,* —— F.2d at ——, slip opinions at 258.

The question of the court's power revolves around two bodies of law: on the one hand, there are the traditional

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[12] Clearly, as a *constitutional* matter, the court has the power to permit this. While the pendent claim here is federal, and thus within one of the constitutional heads of jurisdiction, the same result would follow even if the pendent claim presented a question of state law and diversity of citizenship was absent. Chief Justice Marshall in *Osborn* v. *Bank of the United States,* 22 U.S. (9 Wheat) 738, 821-22 (1824), interpreted the *constitutional* scope of a "case" as including all questions, state or federal. See *United Mine Workers* v. *Gibbs, supra.* The presence of additional parties over whom federal jurisdiction would not otherwise exist does not change this. See, *e.g., Phelps* v. *Oaks,* 117 U.S. 236 (1886); *Dery* v. *Wyer,* 265 F.2d 804 (2 Cir. 1959); *Walmac Co.* v. *Isaacs,* 220 F.2d 108 (1 Cir. 1955).

statutory jurisdictional requirements;[12] on the other, there are the expanding principles of ancillary and pendent jurisdiction. To be sure, before an action can be brought in the federal courts, the requirements of some jurisdictional statute must be met. Here, the named plaintiffs satisfied this under 28 U.S.C. § 1343(3). This is sufficient to vest the court with subject-matter jurisdiction not merely over their primary claim, but also over their own pendent claims—all those arising from the "common nucleus of operative facts"—whether against the defendant to the primary claim or another. We see no valid distinction in the *power* of the court to join additional plaintiffs.[13] Neither do we perceive any inherent limitation that makes Rule 23 *per se* inapplicable to a pendent claim so long as the claim meets the *Gibbs* test of a "common nucleus of operative facts" with the primary claim as well as those of Rule 23 itself. F.R.Civ.P. 23(c)(4) provides that "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues . . .," here the validity of the HEW regulation and the consequent invalidity of the New York procedures. Though no cases have been found permitting a class action to be maintained solely on a pendent claim where the primary claim had not been allowed to be so maintained, nothing in the language of the rule forbids this. Those decisions imposing jurisdictional reqirements on members of the designated class all involve interpretations of some jurisdictional statute and not the rule it-

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[13] See *Wilson* v. *American Chain & Cable Co.*, 364 F.2d 558 (3 Cir. 1966); *Newman* v. *Freeman*, 262 F. Supp. 106 (E.D. Pa. 1966).

self.[14] Without doubt, a court must be alert to possibilities of abuse, such as when the parties to the primary claim do not appear to be the real parties in interest on the pendent claim, or their interest is inconsequential in comparison to the interests of the class. Pendent jurisdiction cannot be invoked merely to circumvent established jurisdictional requirements. Cf. *Sheldon* v. *Sill*, 49 U.S. (8 How.) 440 (1850). But we find no evidence of such a situation here. Barring such evidence, we consider those decisions imposing jurisdictional requirements on class members to be inapposite and independent jurisdiction over the pendent claim unnecessary.

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[14] In *Snyder* v. *Harris*, 394 U.S. 332 (1969), the Court, in two cases brought as class actions pursuant to F.R.Civ.P. 23(b)(3), reaffirmed the traditional test permitting aggregation of claims only when the right asserted is "common and undivided." The Court made clear that it was interpreting the amount in controvery language of 28 U.S.C. § 1332 (and by implication § 1331), a threshold requirement for invoking subject-matter jurisdiction, and thus is not controlling here where subject-matter jurisdiction exists under 28 U.S.C. § 1343(3). However, Mr. Justice Black's opinion for the Court, relied upon *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939), a case in which it is not clear whether joinder or a class action was involved. In following the rule for aggregation later reaffirmed in *Snyder*, the Court in *Clark* also held that each plaintiff must satisfy the jurisdictional amount requirement, even though at least one plaintiff satisfied it and thus subject-matter jurisdiction had attached. While *Snyder* v. *Harris, supra*, does not speak directly to this point, a number of courts have concluded that each member of the class, rather than just the record plaintiffs, must satisfy the amount in controversy requirement in a situation where aggregation is not allowable. But these cases involve interpretations of the jurisdictional statutes and not of Rule 23. See *Alvarez* v. *Pan American Life Ins. Co.*, 375 F.2d 992, 996-97 (5 Cir.), *cert. denied*, 389 U.S. 827 (1967); *Zahn* v. *Int'l Paper Co.*, 40 U.S.L.W. 2237 (D. Vt. September 30, 1971). We express no view on this subject since in the instant case, no independent basis for jurisdiction over the class action was required. Compare 3B Moore, Federal Practice ¶ 23.95 at 23-1851-52 with Wright, Federal Courts 312 (1970).

Appendix B

Having held that the district court had the power to permit plaintiffs to proceed on behalf of their class for declaratory and injunctive relief on their pendent claim, we now turn to the question of discretion. We note at the outset that the pendent claim here, like that in *Rosado* v. *Wyman, supra,* is a federal and not a state claim. At least some of the policies found relevant in *Gibbs,* against unnecessary decisions of state law and avoiding cases where state issues predominate, "whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought," 383 U.S. at 726, are thus not operative. The pendent claim here is one which should rightly be heard in a federal forum since it involves the interpretation of a federal statute and the validity of nationally applicable federal regulations, and concerns a welfare program relying heavily on federal funds. Under the circumstances of this case, determination that plaintiffs are entitled to relief on their pendent claim concerning the invalidity of existing procedures would mean that all other members of the class should receive identical treatment without further inquiry; indeed, it is not too much to expect that the defendants would accord this voluntarily. Unless this were to be done, more suits for similar relief would be commenced; nothing could be more wasteful of judicial time.[15]

Our holding here is thus severely limited. With respect to a class action under F.R.Civ.P. 23(b)(3), where damages or some other relief requiring examination of collateral facts is required, it could well be an abuse of a trial court's discretion to utilize the principle of pendent jurisdiction

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[15] While no factual issue would exist on the merits of the statutory claim, the courts would be forced to sort out insubstantial due process claims to determine whether jurisdiction was properly invoked under § 1343(3), even though the merits of these constitutional claims would never be decided.

to include class claims not otherwise assertable in a federal court, even though they arise from the same nucleus of operative facts as the primary claim.[15a] The would certainly be true where each class member's claim is small, and the factual issues surrounding it are complex. See *Snyder* v. *Harris, supra;* 394 U.S. at 339-40 (Congressional policy, at least in cases raising questions of state law, is to remit cases involving lesser amounts to the state courts).

The State argues also that the due process claims cannot afford a basis for pendent jurisdiction against either defendant since plaintiffs had not exhausted their state remedies. So far as concerns *administrative* remedies, namely, State fair hearings, see *Eisen* v. *Eastman, supra,* 421 F.2d at 567-69, it suffices to say that these could not have remedied the very evil of which plaintiffs complain, namely, termination and reduction of benefits before a proper hearing. It is doubtful that the City's actions could be made the subject of judicial proceedings under Article 78 of the New York Civil Practice Law and Rules until review by the State; in any event, a plaintiff asserting a constitutional claim normally is not required to exhaust similar state judicial remedies before resorting to the federal courts. *Bacon* v. *Rutland R.R.,* 232 U.S. 134 (1914). The State fares no better on its argument with respect to abstention. To be sure, if plaintiff's allegations are correct, the state courts presumably would hold the City's actions to be invalid under its own regulations and federal constitutional decision could thus be avoided. Cf. *Reetz* v. *Bozanich,* 397 U.S. 82 (1970); *Askew* v. *Hargrave,* 401 U.S. 476

[15a] We do not read the district court's order as giving class action status to so much of the complaint as sought damages for the class as distinguished from restitution of benefits unlawfully withheld. See *Eisen* v. *Carlisle & Jacquelin,* 391 F.2d 555, 564-65 (2 Cir. 1968); Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 98, 107 (1965).

(1971). But a decision to abstain from deciding the due process claims pending such proceedings relating to issues of state law would not mean that the federal court lacked jurisdiction of the constitutional claims. Cf. *Rosado* v. *Wyman, supra,* 397 U.S. at 407. Furthermore, in the context of this case, the presence of the pendent statutory claim fulfills a principal purpose of abstention by making it unnecessary to decide the constitutional claim.

A final point, not pressed by the State, which we must nevertheless consider is whether the case was one requiring the convening of a three-judge court under 28 U.S.C. § 2281. Plaintiffs, rather untypically, not only did not request this but sought to avoid it, claiming that they "do not seek to enjoin as unconstitutional a state-wide statute or regulation." Cf. *Ex parte Collins,* 277 U.S. 565 (1928). Presumably what they meant was that their *due process* attack was not upon such a statute or regulation but rather on the application of a New York City regulation. While their statutory attack was upon a state regulation permitting the reduction or discontinuance of assistance after a *Goldberg*-type hearing by a local agency, that did not require a three-judge court under *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965).

III.

The State advances three contentions relating to the merits of the decision on the pendent claim, although the first two of these also have a distinct jurisdictional flavor.

The first is that the district court should not have passed upon New York's failure to comply with the HEW regulations until HEW had conducted a conformity hearing pursuant to 42 U.S.C. § 1316.[16] A similar contention was re-

[16] A determination by HEW adverse to the State after such a hearing would be reviewable by this court at the State's request, 42 U.S.C. § 1316(a)(3).

jected in *Rosado* v. *Wyman, supra,* 397 U.S. at 405-07. The State argues that the statement in *Rosado* that "HEW has no procedures whereby welfare recipients may trigger *and participate in* the Department's review of state welfare programs" (italics supplied) is no longer correct with respect to the italicized phrase in light of *National Welfare Rights Organization* v. *Finch,* 429 F.2d 725 (D.C. Cir. 1970), and HEW's new regulation permitting such participation, 45 C.F.R. § 213.15 (1971). However, the important point is the inability of welfare recipients to trigger such a proceeding, along with the natural reluctance of HEW to embark on a course that could lead to withdrawal of federal aid. 42 U.S.C. § 604.[17]

The State's next point is that the judge should have awaited decision in the action brought by Wyman in the Northern District of New York to have the HEW regulations declared invalid insofar as they require hearings by a State agency before benefits can be adversely affected. We readily agree that it would have been improper for the district court to have held the regulations invalid without affording HEW an opportunity to defend them, and even that it would have been advisable to request HEW to submit a brief. But it does not follow that the district court may not reject a challenge to the validity of HEW's regulation without HEW's being a party, at least in a situation like this where the challenger concedes the question to be solely one of law.

When we come at long last to the State's attack upon the validity of the HEW regulation, we join the district

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[17] The suggestion in *Rosado,* 397 U.S. at 406-07, that district courts obtain the views of HEW whenever possible was limited to cases where HEW "has not set forth its views either in a regulation or published opinion." Here it has done the former.

judge in finding it unimpressive. The State's general position is that HEW has no legitimate concern with the distribution of functions between the State and its subdivisions in the administration of federally assisted programs so long as the right results are achieved.[18] More specifically, the State cites 42 U.S.C. § 602(a) which provides that "A State plan for aid and services to needy families with children must . . . (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan," and claims that the requirement for a State hearing before any adverse action deprives the State of the benefit of the latter option. But it is surely consistent with § 602(a)(3) for HEW, under the broad rule-making authority accorded by 42 U.S.C. § 1302, to determine that State supervision must include the conduct of hearings prior to adverse action. This is especially so in light of § 602(a)(4) which requires a State plan to "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness." It was competent for HEW to determine that the objectives of the federally assisted programs could be better attained by a single state hearing prior to the taking of action rather than having such a hearing conducted by a subdivision of the

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[18] Even if we were to accept this position, it would not carry the day, since the HEW regulations contain substantive provisions differing from the City regulations, e.g., requiring 15 rather than 7 days advance notice.

state subject to review in a state hearing after action had been taken.[19]

IV.

The sole remaining issue is whether the State should be accorded some further time to bring itself into compliance with the HEW regulation.

Although the application here was for a preliminary injunction, there seems to be nothing preliminary about

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[19] An HEW memorandum, dated February 13, 1971, set forth the rationale of the single-hearing requirement, as follows:

1. Holding one hearing, rather than a local hearing followed by a State hearing, will, in our view, be less costly in time and money.
2. Greater impartiality, objectivity and uniformity in the application of State policies is assured when the hearing is not before the agency that made the decision being appealed.
3. The individual and those appearing on his behalf will be subject to only one hearing.
4. This hearing process is closely akin to that which would be required under the Family Assistance Plan.
5. The State agency should be better able to interpret State policies and to determine whether they were correctly applied to the individual's situation, especially when the claimant challenges the correctness of the local agency's application of those policies.
6. A single hearing can be a means for improving hearing procedures and for shortening the time for the total process which, in some States, now exceeds the Federal standard of 60 days.

the order that was issued.[20] There was no suggestion that the parties return to the court with further evidence or argument which might lead to modification of the injunction. Doubtless this was because the district judge, properly in our view, regarded the issue of the validity of the HEW regulation and the consequent invalidity of the State procedure as being solely one of law which he had determined not simply preliminarily but finally. Cf. F.R.Civ.P. 65(a)(2). What remained was to see that the named plaintiffs received their due.

We do not condone the State's conduct when, after having been given 60 days to follow the HEW regulations of February 13, 1971, it neither brought itself into compliance nor initiated any proceedings to contest the validity of the regulations until this action prodded it into doing so. On the other hand, we cannot blind ourselves to the fact that some time will be required to transfer the large apparatus of local hearing machinery to what has been a rather small State system, and that immediate enforcement of the injunction would thus require payment of millions of much needed dollars to recipients whose benefits have been terminated or reduced after proceedings that fully met the constitutional standards prescribed in *Goldberg* v. *Kelly*, simply because the hearing was had before what is the wrong tribunal under the new HEW regulations. This seems to us to run counter to the teaching of *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944), that "The historic injunctive process was designed to deter, not to punish." Although the State must bring itself into compliance with the federal regulations, and soon, a proper balancing of the inter-

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[20] The State's motion for a stay referred to the decree as a "preliminary permanent injunction." While this is a new animal to us, the description is not inapt.

ests calls for postponing the date of the injunction for a reasonable time, on condition that constitutionally valid procedures be followed in the interval.

We therefore affirm the order of the district court but stay its effectiveness until a date 60 days after the filing of this opinion and such further period, if any, as the district court, in its discretion to be exercised upon motion,[21] may allow. During that period the defendants shall be subject to an injunction in the form attached as Appendix A. The injunction issued by the district court is correspondingly modified so that the date in the second paragraph of the injunction shall be the date when the injunction becomes effective rather than April 14, 1971. Nothing herein shall be deemed to affect adversely the rights of any person to the ultimate restitution, in this action or elsewhere, of benefits of which he has been unconstitutionally deprived. Plaintiffs may recover their costs. It is so ordered.

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[21] Notice of any such motion shall be given to HEW as well as to counsel for the plaintiffs and intervenors.

Appendix B

APPENDIX A

IT IS HEREBY ORDERED that George K. Wyman, Commissioner of Social Services for the State of New York, his successors in office, agents and employees, including local social services officials administering AFDC and AABD programs, insofar as said officials have actual notice of this order, and Jule Sugarman, Commissioner of Social Services for the City of New York, his successors in office, agents and employees, are

(1) Restrained from terminating, suspending or reducing public assistance benefits in the federally-aided programs of Aid to Families with Dependent Children and Aid to the Aged, Blind and Disabled, unless and until an opportunity is afforded for a local social services agency hearing comporting with the requirements of 18 N.Y.C.R.R. § 351.26 and *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), it being understood that such a hearing must be accorded when a recipient contends that a State law, rule or policy has been incorrectly applied to the facts of the particular case;

(2) Directed to resume full assistance for all recipients under the AFDC and AABD programs who have had their assistance reduced, suspended or terminated by a local social services agency since April 14, 1971 and have requested a fair hearing from the New York State Department of Social Services and have not yet received a decision from such hearing, but only where such adverse action by the local social services agency was taken without written notice of intent to take such action informing said recipients of their right to a hearing comporting with the requirements of 18 N.Y.C.R.R. § 351.26 or where said recipients have requested such a hearing and none has been provided

(including cases where a recipient contends that a State law, rule or policy has been incorrectly applied to the facts of the particular case); and

(3) Directed to resume full assistance for all recipients under the AFDC and AABD programs who have had their assistance reduced, suspended or terminated since April 14, 1971, and who have requested a State fair hearing after an adverse ruling following a local social services hearing and have not had a decision from said State fair hearing within the time limits set forth in 18 N.Y.C.R.R. Part 84, pending the decision in said State fair hearing.

Appendix C

RULES AND REGULATIONS

§ 205.10 Fair hearings.

(a) *State plan requirements.* A State plan under title I, IV-A, X, XIV, XVI or XIX of the Social Security Act must provide for a system of fair hearings under which:

(1) The single State agency responsible for the program will be responsible for fulfillment of fair hearings provisions.

(2) Every claimant will be informed in writing at the time of application and at the time of any action affecting his claim:

(i) Of his right to fair hearing;

(ii) Of the method by which he may obtain a hearing;

(iii) That he may be represented by legal counsel, or by a relative, friend, or other spokesman, or he may represent himself; and

(iv) Of any provision for payment of legal fees by the agency.

(3) An opportunity for a fair hearing before the State agency will be granted to any individual requesting a hearing because his claim for financial or medical assistance is denied, or is not acted upon with reasonable promptness, or because he is aggrieved by any other agency action affecting receipt, suspension, reduction, or termination of such assistance or by agency policy as it affects his situation. Under this requirement;

(i) A request for a hearing is defined as any clear expression (oral or written) by the claimant (or person acting for him, such as his legal representative, relative, or

friend) to the effect that he wants the opportunity to present his case to higher authority.

(ii) The freedom to make such a request must not be limited or interfered with in any way, and agency emphasis must be on helping the claimant to submit and process his request, and in preparing his case, if needed.

(iii) The claimant must be provided reasonable time in which to appeal an agency action.

(iv) The fair hearing shall include consideration of:

(*a*) Any agency action, or failure to act with reasonable promptness, on a claim for financial or medical assistance, which includes undue delay in reaching a decision on eligibility or in making a payment, refusal to consider a request for or undue delay in making an adjustment in payment, and suspension or discontinuance of such assistance in whole or in part;

(*b*) The agency's interpretation of the law, and the reasonableness and equitableness of the policies promulgated under the law, if the claimant is aggrieved by their application to his situation;

(*c*) Agency decision regarding:

(*1*) Eligibility for financial or medical assistance in both initial and subsequent determinations,

(*2*) Amount of financial or medical assistance or change in payments,

(*3*) The manner or form of payment, including restricted or protective payments, even though no Federal financial participation is claimed, and

(*4*) Conditions of payment, including work requirements.

(v) States may respond to a series of individual requests for fair hearings by conducting a single group hearing. States may only consolidate cases in which the sole issue involved is one of an agency policy. In such a situation, each individual must be given the right to withdraw from the group hearing in favor of an individual hearing. If recipients request a group hearing on such an issue the State must grant it. In all group hearings, whether initiated by the State or by the claimants, the policies governing fair hearings must be followed. Thus, each individual claimant must be permitted to present his own case and be represented by his own lawyer.

(vi) The agency shall not deny or dismiss a request for a hearing except where it has been withdrawn by claimant in writing, or abandoned.

(4) Hearing procedures will be issued and publicized by the State agency for the guidance of all concerned.

(5) In cases of any proposed action to terminate, suspend or reduce assistance:

(i) The State or local agency will give timely and adequate advance notice detailing the reasons for the proposed action. Under this requirement:

(*a*) "Timely" means that the notice is mailed at least 15 days before the action is to be taken.

(*b*) "Adequate advance notice" means a written notice that includes details of reasons for the proposed agency action, explanation of the individual's right to conference, his right to request a fair hearing and the circumstances under which assistance is continued if a fair hearing is requested.

(ii) If, within the advance notice period, the individual responds by indicating his wish for an agency conference,

an opportunity is provided for the recipient (or his representative) to discuss his situation with agency staff, obtain an explanation of the reasons for the proposed action, and present information to show that the proposed action is incorrect. Under this requirement:

(*a*) During this conference, the recipient is given the opportunity to speak for himself or be represented by legal counsel or by a friend or other spokesman.

(*b*) The opportunity for a conference does not in any way diminish the recipient's right to a fair hearing.

(iii)(*a*) In cases in which there is a request for a fair hearing within the advance notice period:

(*1*) Assistance is continued until the fair hearing decision is rendered and through a period consistent with the State's established policies for issuance of payments unless a determination is made by the State agency, in accordance with criteria issued by the Social and Rehabilitation Service, that the issue is one of State agency policy and not one of fact or judgment relating to the individual case, including a question of whether the State agency rules or policies were correctly applied to the facts of the particular case.

(*2*) The agency promptly informs the claimant in writing if assistance will be discontinued, based on the State agency's determination.

(*b*) Alternatively, the State may provide for continuing assistance in all cases.

In cases in which a fair hearing is requested after expiration of the advance notice period, the State may provide for an additional period during which time the request for a hearing will result in reinstatement of assistance to be continued until the fair hearing decision.

(6) Information and referral services are provided to help claimants make use of any legal services available in the community that can provide legal representation at the hearing.

(7) The hearing will be conducted at a time, date and place convenient to the claimant, and adequate preliminary written notice will be given.

(8) The hearings will be conducted by an impartial official (or officials) of the State agency. Under this requirement, the hearing official must not have been involved in any way with the action in question.

(9) When the hearing involves medical issues such as those concerning a diagnosis, or an examining physician's report, or the medical review team's decision, a medical assessment other than that of the person or persons involved in making the original decision will be obtained at agency expense from a source satisfactory to the claimant and made part of the record if the hearing officer or the appellant considers it necessary.

(10) The claimant, or his representative, will have adequate opportunity:

(i) To examine all documents and records used at the hearing at a resonable time before the date of the hearing as well as during the hearing;

(ii) At his option, to present his case himself or with the aid of others including legal counsel;

(iii) To bring witnesses;

(iv) To establish all pertinent facts and circumstances;

(v) To advance any arguments without undue interference;

(vi) To question or refute any testimony or evidence, including opportunity to confront and cross-examine adverse witnesses.

(11) Prompt, definitive, and final administrative action will be taken within 60 days from the date of the request for a fair hearing, except where the claimant requests a delay in the hearing.

(12) The claimant will be notified of the decision, in writing, in the name of the State agency and, to the extent it is available to him, of his right to judicial review.

(13) When the hearing decision is favorable to the claimant, or when the agency decides in favor of the claimant prior to the hearing, the agency will make corrective payments retroactively to the date the incorrect action was taken or such earlier date as is provided under State policy.

(14) Recommendations of the hearing officer or panel shall be based exclusively on evidence and other material introduced at the hearing. The verbatim transcript of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, and the recommendations of the hearing officer or panel will constitute the exclusive record for decision by the hearing authority and will be available to the claimant at a place accessible to him or his representative at any reasonable time.

(15) Decisions by the hearing authority, rendered in the name of the State agency, shall specify the reasons for the decision and identify the supporting evidence. They shall be binding on the State and local agency. Under this requirement:

(i) No person who participated in the local decision being appealed will participate in a final administrative decision on such a case;

(ii) The State agency is responsible for seeing that the decision is carried out promptly.

(16) The State agency will establish and maintain a method for informing, at least in summary form, all local agencies of all fair hearing decisions by the hearing authority and the decisions will be accessible to the public (subject to provisions of safeguarding public assistance information).

(17) In respect to title XIX, when the appeal has been taken on the basis of eligibility determination, the agency responsible for the determination of eligibility for medical assistance, if different from the single State agency administering the medical assistance plan, shall participate in the conduct of the fair hearing.

(b) *Federal financial participation.* Federal financial participation is available for the following items:

(1) Payments of assistance continued pending a hearing decision;

(2) Payments of assistance made to carry out hearing decisions, or to take corrective action after an appeal but prior to hearing, or to extend the benefit of a hearing decision or court order to others in the same situation as those directly affected by the decision or order. Such payments may be retroactive in accordance with applicable Federal policies on corrective payments.

(3) Payments of assistance within the scope of Federally aided public assistance programs made in accordance with a court order.

(4) Service costs incurred by the agency, at the applicable matching rates, for:

(i) Providing legal counsel to represent clients at hearings or in judicial review;

(ii) Providing transportation for the claimant, his representative and witnesses to and from the place of the hearing;

(iii) Meeting other expenditures incurred by the client in connection with the hearing.

(5) Administrative costs incurred by the agency in carrying out the hearing procedures, including expenses of obtaining an additional medical assessment.

(Sec. 1102, 49 Stat. 647, 42 U.S.C. 1302)

Effective date. These regulations shall become effective 60 days from the date of their publication in the FEDERAL REGISTER.

Dated: November 23, 1970.

JOHN D. TWINAME,
Administrator, Social and Rehabilitation Service.

Approved: February 6, 1971.

ELLIOT L. RICHARDSON,
Secretary.

[FR Doc. 71-1981 Filed 2-12-71; 8:45 am]

Appendix D

351.26 Proposed discontinuance, suspension or reduction of grant; prior notice to recipient; additional local review and subsequent determination. (a) When a social services official proposes to discontinue, suspend or reduce a grant of public assistance he shall notify the recipient in writing of his intention to discontinue, suspend or reduce the grant at least seven days prior to the proposed effective date of the discontinuance, suspension or reduction together with the reasons for his intended action, unless such discontinuance, suspension or reduction is in response to the request of the recipient or is due to: the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the State and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category. Such notification shall further advise the recipient; that if he makes a request therefor, he may appear at the time and place indicated in the notice before the person identified therein who will review his case with him; that at such review he will be afforded an opportunity to question any persons who appear at the review and present evidence against him, that he will be afforded an opportunity to present written and oral relevant evidence and argument to demonstrate why his grant should not be discontinued, suspended or reduced; and that he may appear and present such evidence and argument, and ask questions by himself or by an attorney or other representative. Only the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance, suspension or reduction, and

who had not participated in making the proposed determination under review shall be designated to make such review. When a recipient requests such review, the designated reviewer shall, at the time and place indicated in the notice to the recipient, review with the recipient and his representative, if any, the evidence and reasons supporting the proposed action shall afford the recipient an opportunity to question any persons who appear and present evidence against him; and shall afford the recipient an opportunity to present relevant evidence and argument why the proposed discontinuance, suspension or reduction should not be made. Upon the basis of the evidence and argument submitted at the review, the reviewer shall promptly make an appropriate written recommendation to the social services official, together with his reasons therefor, including reference to applicable provisions of law, board rule, department regulation, and approved local policy. The social services official shall expeditiously determine, upon the basis of the recommendation and the evidence and arguments submitted at the review, whether the proposed discontinuance, suspension or reduction shall or shall not be made effective as proposed and shall send an appropriate written notice of his decision to the recipient and his represntative, if any, including the reasons for his determination and the evidence he relied on. Assistance shall not be discontinued, suspended or reduced prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance, suspension or reduction, whichever occurs later.

(b) The provisions of subdivision (a) of this section shall also apply where a social services official proposes to discontinue, suspend, or reduce the extent of authorization for participation in the food stamp program. Notification in such cases shall be given to the head of the household

authorized to participate in the food stamp program. The provisions of this subdivision shall also apply in cases in which an application for continued participation in the food stamp program is denied, or such application for authorization is allowed in a reduced amount.